REMARKS

The present Amendment responds to the Office Action dated May 14, 2008 having a shortened statutory period for response set to expire August 14, 2008. Filed concurrently herewith is a request for a three (3) month extension of time to respond, making the present Response due by November 14, 2008.

Claims 1-23 are pending in the application.

Claim 14 has been withdrawn from consideration.

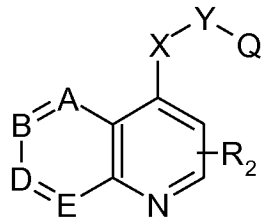
Claims 1-13 and 15-23 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Schaper et al., US 5,821,244 ("Schaper").

Rejections under 35 U.S.C. § 103(a)

Claims 1-13 and 15-23 stand rejected under 35 U.S.C. § 103(a) as being unpatentable over Schaper.

Applicants respectfully traverse the rejection and request reconsideration of the claims in view of the arguments presented herein.

As the Examiner highlights in the Office Action, Schaper teaches a compound of the Formula:



wherein two of the symbols A, B, D and E are in each case CR^1 and the remaining two symbols are in each case CH or nitrogen. Accordingly, the Examiner has stated the Schaper differs from the instant claims in not permitting pyridine-1,2,4-triazine by limiting the choices of A, B, D and E to include a maximum of two nitrogen atoms.

The Examiner argues that given the fact that each of the A, B, D and E can have nitrogen as a choice and still show fungicidal activity is clearly indicative of the equivalence of these positions. The Examiner continues by stating that one trained in the art would have been motivated to make all possible combination of A, B, D, E choices for the said ring including the 1, 2, 4-triazine core and expect these compounds to have fungicidal activity in view of the equivalence outlined above.

Applicants assert the Examiner has not established a prima facie case of obviousness, and that the Examiner's obvious to try rationale is in error.

To reject a claim on based on obvious-to-try, the Examiner must resolve the *Graham* factual inquires, then articulate the following:

(1) A finding that at the time of the invention, there had been a recognized problem or need in the art…

(2) A finding that there had been a finite number of identified, predictable potential solutions to the recognized need…

(3) A finding that one of ordinary skill in the art could have pursued the know potential solutions with a reasonable expectation of success; and

(4) Whatever additional findings based on the Graham factual inquires may be necessary, in view of the facts of the case under consideration, to explain a conclusion of obviousness.

With respect to (1), Applicants submit the Examiner has not properly articulated a recognized problem or need in the art.

With respect to (2) & (3), Applicants submit the Examiner has not shown there is finite number of identified, predictable solutions to the recognized need, nor has Examiner properly articulated a finding that one of ordinary skill in the art could have pursued the know potential solutions with a reasonable expectation of success.

The Examiner states the only choices not recited for the ABDE ring are tetrazine, two isomeric 1,2,3-triazines, and two isomeric 1,2,4-triazines. The Examiner then states the Schaper shows the position of the nitrogen in the ABDE ring does not alter the activity of the these compounds as a fungicide, and thus, Schaper suggests the position of the nitrogen is not critical and thereby provides the motivation to one trained in the art that the remaining variable of the ABDE ring would also be active.

Applicants respectfully assert that with respect to the criticality of the nitrogen position, Schaper teaches the non-critical position of nitrogen with respect to only one nitrogen. Applicants note that when a second nitrogen atom is added to the ring Schaper exemplifies the two nitrogen atoms only at the A and E position (Schaper, col. 29-30, Pteridines). Thus, Applicants respectfully assert that Schaper fails to teach a non-critical position of more than one nitrogen atom in the ABDE ring.

Applicants respectfully assert the Examiner has failed to properly provide a finding that one of ordinary skill in the art woud have a reasonable expectation of success that the inclusion of a third nitrogen atom would lead a fungicidally effective compound. Applicants assert that Schaper fails to teach the inclusion of a third nitrogen atom in the ABDE ring, and respectfully assert that Schaper specifically teaches the inclusion of only one or two nitrogen atoms in the ABDE ring, and

thus teaches away from the inclusion of three nitrogen atoms. Applicants respectfully submit that the Examiner's conclusion that the addition of thrid nitrogen atom to ABDE ring would reasonably lead to compound having fungicidal activity is in error. Biological results of coumpounds can be unpredictable, close analogs and hetereocycles with heteroatoms in different positions or heterocycles with different numbers of heteroatoms may give different results. Where Schaper specifically teaches the inclusion of only one or two nitrogen atoms in the ABDE ring, one of ordinary skill in the art would not have a reasonable expectation of success that the inclusion of a third nitrogen atom would lead a fungicidally effective compound.

Applicants note the Federal Circuit has given some examples of what would constitute an "obvious to try" modification based on the prior art. See *In re O'Farrell*, 853 F.2d 894 (Fed. Cir. 1988). "In some cases, what would have been 'obvious to try' would have been to vary all parameters or try each of numerous possible choices until one possibly arrived at a successful result, **where the prior art gave either no indication of which parameters were critical or no direction as to which of many possible choices is likely to be successful**. In others, what was 'obvious to try' was to explore a new technology or general approach that seemed to be a promising field of experimentation, where **the prior art gave only general guidance as to the particular form of the claimed invention or how to achieve it**." *Id.* at 903, 7 U.S.P.Q.2d at 1681 (citations omitted).

Applicants respectfully assert that in the instant case the prior art reference of Schaper gives specific guidance and critical direction as to the possible choices that were likely to succeed, those choices include no more than two nitrogen atoms in the A-B-D-E ring.

Based on the foregoing reasons, then, Applicants respectfully submit that the claimed invention, which requires that three nitrogens be position on the W, X, Y, Z cycle is not obvious in view Schaper. As such, Applicants believe that the requisite motivation to establish a *prima facie* case cannot be derived from Schaper. Rather, a conclusion that Applicants' claimed invention is obvious, based solely upon the disclosure of Schaper, can only be found upon hindsight reasoning, which is impermissible in establishing a *prima facie* case of obviousness. As such, Applicants respectfully request that the Examiner withdraw the § 103(a) rejection of all pending claims.

Applicants note that claim 17, which depends from claim 1 is directed to a compound of formula 1 wherein:

W, Y, and Z are each N;

R^1 is 2,4,6-trifluorophenyl group; and

R^2 is NR^3R^4.

With respect to the values of R^3R^4, Applicants have excluded substitution thereof by a cycloalkyl group. In addition to the foregoing arguments, new claim 17 is not obvious in view of the teachings of Schaper because when substituent X of formula (Ic) of Schaper is nitrogen, the nitrogen is always substituted by Q, which is a cycloalkyl group. In addition, the presence of the 2,4,6-trifluorophenyl group further removes the claimed structure from the compounds disclosed in Schaper.

Based upon the foregoing then, Applicants submit that the pending claims are in condition for allowance and the Examiner is courteously solicited to pass this application on to allowance. No other fees are believed to be payable at this time. However, the Commissioner is authorized to debit any applicable fees from the deposit account of the undersigned, no 50-1676 in the name of Syngenta Crop Protection, Inc.

Respectfully submitted,

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